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7 OWEN DIAZ,
8 Plaintiff,
9 v.
10 TESLA, INC., et al.,
11 Defendants.

Case No. [3:17-cv-06748-WHO](#)

ORDER ON MOTIONS IN LIMINE

Re: Dkt. Nos. 185, 187, 188, 200

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13 Plaintiff Owen Diaz's Section 1981 claim against defendant Tesla, Inc. will proceed to trial
14 on **October 1, 2020**.¹ Before me are the parties' motions in limine, many of which focus on
15 which individuals can testify, what their testimony can encompass, and requested limits on the
16 other side's questioning. As I reminded the parties at the May 11, 2020 pretrial conference, this
17 case is about Diaz and the work environment he experienced at the Tesla factory in Fremont. As
18 described in more detail below, people who worked with and near Diaz will be permitted to testify
19 broadly about that work environment, including unrelated incidents of racial harassment that
20 allegedly gave Tesla notice that racial harassment was occurring.

21 **A. Diaz's Motions**

22 **1. Ramon Martinez**

23 Diaz asks that I prevent Tesla from calling alleged harasser Ramon Martinez as a witness
24 because Diaz was unable to depose him. According to Diaz, Tesla failed to update the requested
25 contact information, and his own efforts to locate Martinez were unsuccessful. Tesla counters that

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27 ¹ Although the trial date was previously set for September 28, 2020, the United States District
28 Court for the Northern District of California will not be holding civil trials prior to October 1,
2020 per General Order 72-3.

1 Diaz never made it aware of his difficulties locating Martinez, even after it disclosed in 2019 that
2 Tesla had hired him, and that Diaz did not include Martinez on his deposition list even after I
3 granted him 14 additional hours on October 3, 2020. Dkt. No. 93. In response to my question at
4 the pretrial conference, Diaz raised no inaccuracies in the timeline Tesla laid out. He represented
5 that when he continued to be unable to identify Martinez for purposes of a deposition, he
6 understood from my discovery orders that Tesla would not get the benefit of his testimony.

7 I will not prevent Tesla from calling Martinez as a witness, nor will I allow a deposition at
8 this late stage. Tesla's undisputed chronology shows that Diaz was not diligent in pursuing a
9 deposition. He most recently requested Martinez's contact information in June 2018, even though
10 Tesla disclosed in 2019 that it had hired Martinez (who was previously a staffing agency
11 employee). Diaz neither informed Tesla of his difficulties nor asked Tesla to accept a subpoena
12 on Martinez's behalf, despite doing the same for other Tesla employees. Given this lack of
13 diligence, his reliance on my discovery orders was unreasonable. Those orders did not give Diaz a
14 pass to decline to depose a key witness and then prevent Tesla from calling him at trial.

15 Next, Diaz moves to exclude the statement Martinez wrote as part of Chartwell's
16 investigation into the racist drawing incident at the Tesla factory. Tesla counters that the
17 statement is not hearsay because it will be offered not for its truth but rather to rebut a charge of
18 fabrication or to rehabilitate Martinez's credibility. As I told the parties at the pretrial, I will make
19 final rulings on document admissibility at trial; however, it appears that the statement will be
20 admissible as non-hearsay or under an exception to the hearsay bar.

21 2. Rothaj Foster and Diaz's Work Performance

22 Diaz seeks to prevent Tesla from introducing evidence of his working relationship with
23 Rothaj Foster, who was on Diaz's team when he was an elevator lead, along with evidence of
24 Diaz's work performance more broadly. Diaz has narrowed his Section 1981 claim,² and at trial
25 he intends to proceed only on a theory of harassment and failure to prevent harassment.
26 According to him, this narrowing means that evidence of his work performance, including his

28 ² His Amended Complaint includes discrimination, harassment, constructive discharge, and
wrongful termination.

1 relationship with Foster, is irrelevant “[e]xcept to the extent that race was a factor in Owen’s
2 coworkers not getting along with him.”

3 It would be improper to limit the evidence in the manner Diaz suggests. As Diaz’s
4 proposed jury instructions acknowledge, the jury will have to assess the totality of the
5 circumstances to determine whether there was a hostile work environment at the Tesla factory—
6 and the totality of the circumstances includes Diaz’s work performance. *See Clark Cty. Sch. Dist.*
7 *v. Breeden*, 532 U.S. 268, 270–71 (2001) (noting that these circumstances include “the frequency
8 of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a
9 mere offensive utterance; and whether it unreasonably interferes with an employee’s work
10 performance”) (internal quotation marks omitted). To limit the jury’s exposure only to incidents
11 that Diaz says related to race would make analysis under the totality of the circumstances
12 impossible.

13 At the pretrial conference, Diaz raised his concern that Tesla will use evidence of his work
14 performance to malign his character and excuse the racially harassing environment at the Fremont
15 factory. Obviously, evidence of whether Diaz was a great or terrible employee is not relevant
16 except to the extent that it is offered to explain defendants’ decisions or the context of other
17 conduct. I will ensure that the evidence is used for a proper purpose and with an appropriate
18 framing for the jury. Diaz’s assertion that the alleged work performance issues were minor—
19 which he is welcome to argue at trial—does not make them unfairly prejudicial. Evidence of
20 Diaz’s work performance, including his relationship with Foster, is admissible as set forth above.

21 **3. Tamotsu Kawasaki, Wayne Jackson, and Michael Wheeler³**

22 Over Diaz’s objections, Kawasaki, Jackson, and Wheeler will be permitted to testify about
23 hearing the n-word in the Tesla factory, including their perception of the context of its use
24 (namely, whether it was used in an offensive or friendly manner). Diaz first argues that such
25 testimony is not relevant. He acknowledges that his Section 1981 claim requires him to establish
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³ Diaz and Tesla also dispute the scope of Jackson and Wheeler’s testimony in Tesla’s motions in
28 limine, described below. The back-and-forth shows that both sides seek to impose improper
limits.

1 not only that he subjectively found the use of the word offensive but also that a reasonable African
2 American person would have found it offensive. *See Faragher v. City of Boca Raton*, 524 U.S.
3 775, 787 (1998). But according to him, the testimony from other Tesla factory workers is
4 irrelevant because they did not hear the n-word in precisely the same context in which Diaz heard
5 it. Diaz is welcome to raise the differences in context during cross-examination, but those
6 differences do not make the testimony irrelevant.

7 Second, Diaz argues that the opinions are improper lay witness testimony because they are
8 based on speculation rather than actual knowledge of the speaker's intent or the hearer's reaction.
9 Again, Diaz can raise the limits of the witnesses' perception and knowledge on cross-examination,
10 but these limits do not mean that their opinions are improper speculation. Finally, the probative
11 value of the testimony is not substantially outweighed by the risk of unfair prejudice. Not only is
12 this testimony permissible, it is directly relevant to the jury's assessment of Diaz's Section 1981
13 claim.

14 4. Demetric Diaz

15 Diaz seeks to exclude evidence of the arrest and felony charges of his son Demetric, who
16 was formerly a plaintiff in this case. First, Diaz argues that the evidence is not relevant, while
17 Tesla counters that it is directly relevant to Diaz's claim for emotional distress damages given that
18 both Diaz and his expert Dr. Anthony Reading have cited issues with Demetric as contributing to
19 Diaz's ongoing emotional distress. I agree with Tesla. It is entitled to explore the extent to which
20 Demetric's criminal involvement has contributed to Diaz's emotional distress, including the role
21 that finances may have played.

22 Second, Diaz argues that the evidence is improper impeachment because while Demetric
23 has been convicted, he has not yet been sentenced. In the only case Diaz cites in support of his
24 argument, the court held that a recent conviction was not admissible for impeachment where the
25 time to appeal had not yet expired. *See Beasley v. United States*, 218 F.2d 366, 368-69 (D.C. Cir.
26 1954). Here, by contrast, Demetric apparently pleaded guilty. In the event that Demetric testifies,
27 evidence of his convictions is proper impeachment under the plain language of Rule 609(a). As
28 for the admissibility of the evidence under Rules 404(b) and 608, Tesla represents that it "does not

1 intend to attack Demetric's character or propensity for truthfulness with evidence of his post-Tesla
2 arrests and plea deals."

3 In order to limit the prejudicial effect of this evidence, I will preclude reference to the
4 specifics of the crimes. Instead, Tesla may refer only to the fact of the convictions and the amount
5 of the bond (if Diaz indeed helped pay it). The parties should reach an agreement on the language
6 they will use in the presence of the jury (i.e., "serious felonies").

7 **B. Tesla's Motions**

8 Tesla's motions seek to preclude "me too" testimony and evidence about racial harassment
9 that individuals other than Diaz allegedly experienced at the Fremont factory. Tesla argues that
10 this testimony is not relevant because "(1) [the challenged individuals] did not work at Tesla
11 during the time Owen worked there; (2) they did not raise any complaints about their work
12 environment at Tesla during the time Owen worked there; (3) they did not work with Owen; (4)
13 they did not work in the same department as Owen; (5) they did not share the same supervisors as
14 Owen; and (6) none of the 'me too' witnesses' alleged harassers were the same as those claimed
15 by Owen." Tesla argues that mini trials will be required to explore the accuracy or inaccuracy of
16 these accounts.

17 Anecdotal evidence of past discrimination "might prove inadmissible in the typical case of
18 individual discrimination" by contrast with a pattern or practice claim. *Obrey v. Johnson*, 400
19 F.3d 691, 698 (9th Cir. 2005). To determine whether evidence of discrimination by other
20 supervisors is admissible under Rule 403, the court should conduct a "fact-intensive, context-
21 specific inquiry," including consideration of "how closely related the evidence is to the plaintiff's
22 circumstances and theory of the case." *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379,
23 388 (2008). "[T]he district court retains broad discretion to determine whether the probative value
24 of the evidence at issue is substantially outweighed by considerations of 'undue delay, waste of
25 time, or needless presentation of cumulative evidence.'" *Obrey*, 400 F.3d at 698 (quoting Fed. R.
26 Evid. 403); *see Hill v. Goodfellow Top Grade*, No. 18-cv-01474-HSG, 2019 U.S. Dist. LEXIS
27 150796, at *5-6 (N.D. Cal. Sep. 4, 2019) (excluding "me too" evidence of race discrimination
28 because it would require the defendant to rebut the allegations, which had "virtually no similarity")

1 to the plaintiff's).

2 Diaz argues that those who experienced the same sorts of racial harassment he did—
3 namely being called the n-word, including in the presence of supervisors, and seeing racist
4 graffiti—should be able to testify to those incidents and to complaints they made. This evidence
5 shows that Tesla knew or should have known about the harassment and thus had an obligation to
6 remediate it. Diaz asserts that the testimony will have additional relevance if Tesla raises an
7 *Ellerth/Faragher* defense that it exercised reasonable care to prevent and correct harassing
8 behavior at the factory and that Diaz unreasonably failed to report the harassment and take
9 advantage of remedial measures. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998);
10 *see also Hill*, 2019 U.S. Dist. LEXIS 150796, at *6–8 (putting the defendant on notice that raising
11 the *Ellerth/Faragher* defense could open the door to evidence of ignored complaints in the
12 plaintiff's rebuttal case).

13 As set forth below, I agree with Diaz in part and will allow some individuals to testify
14 about unrelated incidents of harassment if the testimony could tend to establish that Tesla had
15 notice of the racially harassing environment. With respect to Tesla's motions to exclude
16 documents related to me too incidents, I will rule on admissibility during the course of trial when I
17 have an understanding of the context in which the documents are sought to be used.

18 **1. Demetric Diaz**

19 Tesla argues that Diaz's son Demetric should not be permitted to testify about the racial
20 harassment he allegedly experienced at the Tesla factory because he worked there for a short time,
21 was in a different department and work area, and had a different supervisor. Diaz counters that
22 Demetric's time overlapped with his father's, who observed Demetric's supervisor calling him the
23 n-word, and that Demetric testified at his deposition that he made oral complaints about the
24 harassment he endured. I will allow Demetric to testify to the events and complaints about which
25 Diaz was aware. Tesla can cross-examine Demetric about the absence of records of his
26 complaints.

27 **2. Lamar Patterson**

28 Tesla argues that former plaintiff Patterson should be precluded from testifying about

1 harassing incidents that did not involve Diaz. According to Diaz, Patterson should be able to
2 testify about hearing the n-word and seeing racist graffiti in the Tesla factory because he and
3 Patterson worked in the same area and had the same supervisor. I will not limit Patterson's
4 testimony as Tesla requests. Given that Patterson and Diaz's work overlapped in all respects, the
5 jury could rely on testimony about Patterson's alleged complaints to Romero to conclude that
6 Tesla had notice of the harassing environment and, thus, a duty to remediate it.

7 **3. Michael Wheeler**

8 Wheeler and Diaz overlapped at the Tesla factory and knew one another there. Both
9 worked with Diaz's alleged harasser Martinez, and both indicated at their depositions that they
10 complained to Victor Quintero about incidents of harassment. Given this overlap, I will allow
11 Wheeler to testify about incidents of harassment that he complained of (to show Tesla's notice) or
12 that Diaz was aware of (to explain Diaz's failure to prevent). Tesla can explore the gaps in
13 Wheeler's testimony during cross-examination.

14 **4. Wayne Jackson**

15 Tesla argues that Jackson should not be permitted to testify generally about hearing the n-
16 word because his job took him all over the factory (which is five million square feet), and at his
17 deposition he was unable to specify where and when he heard the word. Diaz counters that
18 Jackson's testimony is relevant to explore how he viewed and responded to Diaz's own
19 complaints, specifically his disregard for Tesla's policies, in response to the *Ellerth/Faragher*
20 defense. If Tesla raises this defense, Jackson's testimony will likely be admissible on rebuttal.
21 Further, if at any time during the trial Tesla explores with Jackson his view that the n-word was
22 used in a non-offensive manner, it will open the door to Diaz's own exploration of the occasions
23 on which Jackson overheard the word.

24 **5. Melvin Berry**

25 Tesla represents that Diaz listed Berry's contact info as "unknown" during discovery while
26 his counsel in fact represents Berry. When I questioned Diaz's counsel about this at the pretrial
27 conference, he did not dispute this fact but rather argued that his late disclosure of Berry is not
28 prejudicial because Tesla will have the opportunity to depose him in a different proceeding before

1 this case goes to trial. Diaz provides no good cause for his failure to disclose Berry as a witness;
2 he will not be permitted to testify at trial.

3 **6. Nigel Jones**

4 Tesla argues that Jones's testimony about racial harassment at the Tesla factory are
5 irrelevant to this case because he and Diaz did not work together or know each other. Diaz
6 counters that Jones's time overlapped with Diaz (contrary to Tesla's motion, by more than one
7 week) and that his testimony will corroborate the frequent use of the n-word in the factory,
8 including in the presence of supervisors.

9 Given the absence of any overlap with Diaz's work, work areas, or supervisors, this
10 testimony is not relevant to Diaz's case in chief. As noted above, it could become relevant if Tesla
11 relies on an *Ellerth/Faragher* defense; that determination will await trial.

12 **7. DeWitt Lambert**

13 Tesla represents, and Diaz does not dispute, that Lambert worked in a different department,
14 had different supervisors, and had different alleged harassers. Even if he reported the incidents of
15 harassment, without any overlap with Diaz, those reports would not put Tesla on notice regarding
16 problems with Diaz's department, coworkers, or supervisors. Accordingly, Lambert's testimony
17 is inadmissible in Diaz's case-in-chief.

18 I draw the same conclusion concerning each of the remaining witnesses discussed below.
19 If Tesla raises an *Ellerth/Faragher* defense, Lambert's testimony could be admissible, and it is
20 possible that some of the remaining witnesses might also be allowed as rebuttal witnesses as long
21 as they are relevant and not duplicative. I cannot make that determination until the time of trial
22 after the case-in-chief has been presented.

23 **8. Nathan Fraim**

24 Tesla represents, and Diaz confirms, that Fraim did not begin working at Tesla until after
25 Diaz had left. Accordingly, his testimony is not relevant to Diaz's case-in-chief, although it could
26 be relevant to explain Diaz's alleged reporting failure if Tesla raises the *Ellerth/Faragher* defense.
27 I will assess that possibility at trial.

9. Titus McCaleb⁴

Tesla represents, and Diaz does not dispute, that McCaleb began working at the Tesla factory long after Diaz, in a different department and with different supervisors, meaning his testimony is not relevant to Diaz's case-in-chief. I will assess the admissibility of his testimony at trial if Tesla raises an *Ellerth/Faragher* defense.

10. Jackel Williams

The same is true for Jackel Williams, who began working at Tesla after Diaz left—in 2017 according to Diaz and in 2018 according to Tesla, and in the battery according to Diaz and as a security guard according to Tesla. I will assess the admissibility of her testimony in rebuttal if Tesla raises an *Ellerth/Faragher* defense at trial.

11. Randall Kennedy's Book

Finally, Tesla argues that Diaz's counsel should be precluded from using a book entitled "N-word" by Randall Kennedy as a prop during trial because it is irrelevant to Diaz's claim and will unfairly prejudice the jury. Diaz counters that the n-word is at the heart of this case and that he does not seek to introduce the book into evidence. Because Kennedy's book has no probative value in this case, the motion is GRANTED. Diaz is free to rely on other strategies to communicate the power of the n-word to the jury.

C. Sealing

Finally, Diaz filed several exhibits under seal pursuant to confidentiality designations by Tesla and former defendants, but none of the defendants submitted a declaration in support of sealing as required by the Civil Local Rules. Accordingly, the sealing request at Dkt. No. 188 is

⁴ As far as Brandie To, Diaz does not dispute that he failed to include her name on his initial disclosures, instead arguing that former defendant West Valley's document production included her name. West Valley's document production does not satisfy Diaz's discovery obligations. Diaz will not be permitted to call To as a witness.

1 DENIED and the Clerk shall UNSEAL the docket entry in its entirety.

2 **IT IS SO ORDERED.**

3 Dated: May 22, 2020

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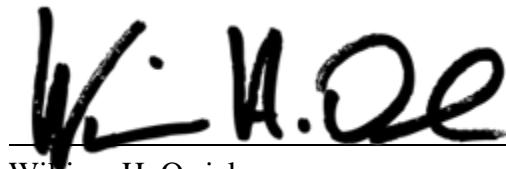
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William H. Orrick
United States District Judge